Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

92-1909

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GEORGE R. CROUCH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERROLD M. LADAR
ERIK J. SIVESIND
507 Polk Street, Suite 310
San Francisco, California 94102
(415) 928-2333

JERROLD M. LADAR
Counsel of Record and
Counsel for Petitioner
GEORGE R. CROUCH

QUESTION PRESENTED

Whether it is a denial of equal protection and due process of law for a district court to create a discrete class of medically infirm criminal defendants, consisting of those aware of their affliction at the time of their offense, and on that basis refuse to exercise its discretion concerning a downward sentencing departure for health reasons.

LIST OF PARTIES

The parties below were the petitioner, George R. Crouch and the respondent, the United States of America, represented by Janet Reno, Attorney General of the United States and John Mendez, U.S. Attorney, Northern District of California.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

PETITION 1

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT 13

CONCLUSION 22

APPENDIX (follows Conclusion)

TABLE OF AUTHORITIES

CASES

Botero Gomez v. U.S., 725 F.Supp. 526 (S.D. Fla. 1989) 21

Specht v. Patterson, 386 U.S. 605 (1967) 14

U.S. v. Barker, 771 F.2d 1362 (9th Cir. 1985). 16

U.S. v. Brady, 895 F.2d 538 (9th Cir. 1990). 15,16

U.S. v. Morales, 898 F.2d 99 (9th Cir. 1990) 18

Williams v. U.S., 503 U.S. ___, 117 L.Ed.2d 341 (1992) 19

STATUTES

18 U.S.C. § 3231 2

18 U.S.C. § 3552(b). 5

18 U.S.C. § 3553(a). . . . 12,16,17,18,21

18 U.S.C. § 3661 16

18 U.S.C. § 3742(a). 2,11,18

28 U.S.C. § 991(b) 16

28 U.S.C. § 1254(1). 3

28 U.S.C. § 1291 3,11

U.S. SENTENCING GUIDELINES

§ 5H1.4 4,5,12,19,20,21

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GEORGE R. CROUCH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner George R. Crouch respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the action entitled United States v. George R. Crouch, No. 91-10567, on November 2, 1992.

OPINIONS BELOW

The memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit, in U.S. v. Crouch, No. 91-10567, filed November 2, 1992, and the Order of that Court, filed February 24, 1993, denying the Petition for Rehearing and Suggestion for Rehearing In Banc, were not reported and are reproduced in the Appendix hereto, infra at 1a and 35a.

JURISDICTION

The United States District Court for the Northern District of California entered judgment on November 7, 1991 and imposed sentence on the petitioner on November 6, 1991, pursuant to 18 U.S.C. § 3231.

Petitioner's sentence was appealed to the U.S. Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 18 U.S.C. § 3742(a)(1) and (2), and 28

U.S.C. § 1291.

A Petition for Rehearing and Suggestion for Rehearing In Banc was denied by the Ninth Circuit by Order filed February 24, 1993.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

18 U.S.C. § 3552(b)

18 U.S.C. § 3553(a)

28 U.S.C. § 991(b)

U.S. Sentencing Guidelines § 5H1.4

-Reproduced in Appendix, infra at 39a.

STATEMENT OF THE CASE

Following a guilty plea, petitioner was convicted of distributing cocaine and was sentenced to 200 months (16.7 years) and a $1 million fine. The court rejected the government's motion for downward departure for substantial assistance, and refused to consider a downward departure based on petitioner's HIV disease and other medical problems. The court's decision to create a class of defendants ineligible for consideration for a departure pursuant to the Sentencing Commission's policy statement on health departures forms the basis for this petition. U.S.S.G. § 5H1.4.

Petitioner contracted HIV disease in 1982, having acquired the disease from his wife, a registered nurse who was infected on the job by a hypodermic needle "stick." Petitioner became aware of his HIV infection in 1988. At the time of sentencing in

November, 1991, petitioner had late stage ARC disease. Since he began his sentence the disease has progressed and petitioner now has AIDS.

Petitioner's motion for a health departure under U.S.S.G. § 5H1.4 was preceded by a request for a presentence study to be performed by the Bureau of Prisons (BOP) on the health departure issue, pursuant to 18 U.S.C. § 3552(b). This statute provides the courts with a mechanism for obtaining further information concerning pertinent sentencing factors. Since petitioner and the government disagreed about both the adequacy of medical care available through the BOP and petitioner's unique health problems, petitioner's theory was that a health study performed by the BOP would help the court resolve the health departure issue.

On September 6, 1991, two months before sentencing, defense counsel submitted

a letter to the U.S. Probation Officer, with a copy to the Assistant U.S. Attorney, requesting the presentence study on the health departure issue. On October 8, following a favorable review by Probation, the request for the study was submitted to the court by letter. The court, through its law clerk, communicated to counsel that it would initially deny the request, but advised that the study issue could be raised at the sentencing hearing.

The court knew that petitioner had HIV disease, and that he had been hospitalized on two occasions in the months before sentencing. Petitioner was hospitalized on the first occasion for two weeks, over a week of which was in intensive care.

At the sentencing hearing, the court had before it the following uncontradicted evidence of petitioner's medical condition: letters from two of petitioner's treating physicians detailing his condition and

treatments, a statement from petitioner describing his medical and dietary regime and a letter and declaration from Alan S. Levin, M.D., a Board Certified Immunologist, giving further details of petitioner's unique medical condition that differentiated him from the "average" HIV/AIDS patient.[1]

The information before the court on the ability of the BOP to provide adequate medical treatment for petitioner was a letter from the Medical Director of the BOP, Dr. Moritsugu, and an affidavit from E.S. Nelson, D.O., Chief of Medicine at the USMCFP, Springfield, Missouri. Dr. Moritsugu's letter gave background information on the AIDS population in the Federal Prison system and a general description of the treatment available to

1. Dr. Levin reported that petitioner had a preexisting history of immune deficiency problems, a long history of recurrent infections and irritable bowel syndrome.

HIV infected inmates. The affidavit by E.S. Nelson, D.O., noted that he had reviewed the exhibits included in defendant's Sentencing Memorandum, and he listed the treatment provided to AIDS patients at the Springfield facility. Dr. Nelson's affidavit did not, however, address petitioner's specific conditions or treatment regime, nor draw any conclusions as to the BOP's ability to effectively treat petitioner. He pointed out that DDI, a part of petitioner's treatment was now available through the BOP, a fact not known to Dr. Levin at the time his declaration was written.[2] Dr. Nelson observed that experimental and investigative therapies -- the heart of petitioner's treatment regime -- were not available without a "specific compassionate permit"

2. Dr. Levin stated that imprisonment would preclude four important treatments petitioner received: DDI, Trichosanthin infusions, Gammaglobulin intravenous infusions and several dietary supplements.

issued by Dr. Moritsugu.

At sentencing the court advised defense counsel that in denying the study request it was relying on the information provided by Drs. Moritsugu and Nelson. "And they make it clear that, in their opinion, the BOP offers adequate medical care to its HIV positive patients." (emphasis added) Reporter's Transcript of Sentencing Hearing, Appellant's Excerpt of Record at 68.

The court then advised counsel that it "gave a great deal of weight to the statement" in the government's sentencing memorandum that the petitioner became aware he was HIV positive in 1988.

> Court: I am reading from your (the government's) memorandum:
>
> "This awareness long-predated the activity in the instant and very serious drug trafficking offense. Indeed, it appears that Crouch was actively involved in other drug trafficking activities earlier in 1989 as well. Therefore, it is

> clear that the risk of being caught was well-known to Crouch. It is a risk which he weighed and decided to take ... To the extent that he may suffer additional stress as a result of his incarceration is a result which he brought upon himself. It provides no reason for this court to depart downward for health reasons and, similarly, no reason on this record for the court to order a section 3552 study."

Appendix, infra at 20a.

In adopting the government's assumption of the risk argument, the court did not distinguish between the presentence study request and the motion for a health departure. The court made no further reference to the health departure during the hearing, and denied the request for a presentence study. The court then imposed a sentence within the guideline range reflected in the PSR.

In the court's Order Denying Bail Pending Appeal, filed one week after entry of judgment, (Appendix, infra at 37a) the court removed any ambiguity about whether its

reliance on petitioner's awareness of his HIV disease pertained to only denial of the presentence study or also to the health departure. After ruling that the BOP could provide adequate care, based on the BOP's own submissions, the court continued:

> The Court further finds that notwithstanding that the defendant is HIV-positive, the defendant knew he was HIV-positive at the time he committed the instant very serious drug offense. Accordingly, the Court would not base any "health departure" downward on the fact that this defendant is HIV positive.

Appendix, infra at 33a.

The defendant appealed his sentence to the Ninth Circuit, invoking jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. 3742(a). In affirming petitioner's sentence, the Court focused on the lower court's factual finding that adequate medical care could be provided, reasoning that the lower court was under no legal compulsion to do more than receive

generalized assurances from the BOP that it could adequately care for HIV infected inmates. Memorandum Opinion, Appendix infra at 5a-6a.

The opinion did not address the issue of whether the lower court had refused to exercise its discretion to depart for health reasons under U.S.S.G. § 5H1.4. Instead, the Court held that it had no jurisdiction to consider a discretionary refusal to depart downward from the Guidelines. The Court therefore equated a refusal to depart with an exercise of discretion. Appendix, infra at 9a-10a.

In his Petition for Rehearing, the defendant argued that the lower court had not exercised any discretion on the health departure issue, but had abdicated such exercise by placing the petitioner in a class of defendants not deserving of the protections afforded by 18 U.S.C. § 3553(a)(2)(D) and U.S.S.G. § 5H1.4:

defendants who accept the risk of inadequate medical treatment because they were aware of their affliction at the time of their offense. The defendant submitted that if the district court abdicated the exercise of its discretion, and did so because of an improper classification of the defendant, then the court deprived petitioner of the due process of law. The Petition for Rehearing was denied without further opinion by the Court.

REASONS FOR GRANTING THE WRIT

The Decision Below that a Sentencing Court May Deprive a Class of Medically Infirm Criminal Defendants of the Protections of the Law Raises An Important and Unresolved Problem that Should be Decided by this Court

The opinion of the Ninth Circuit sanctions application of a sentencing policy that threatens to deprive a discrete class of criminal defendants of due process and equal protection of the law; it has

already deprived the petitioner of these protections. By allowing the lower court to shirk its duty to determine adequacy of medical care, on the basis of the defendant having accepted the risk of inadequate care, subjects any defendant who knows of his infirmity to a violation of due process and equal protection rights. This Court has long recognized that a criminal defendant must be accorded both due process and equal protection at sentencing. Specht v. Patterson, 386 U.S. 605, 608.

The approach to sentencing sanctioned by the Ninth Circuit allows the court to select criteria of its own choosing to create a class of defendants not entitled to the protections established by Congress. Under the lower court's reasoning, defendants with AIDS, cancer, blindness or quadraplegia, who commit crimes knowing of their disability, thereby absolve the court of its responsibility to

determine adequacy of medical care, and to exercise its discretion concerning health departures. Were race or religion the criteria selected by the lower court for creating this class of defendants it clearly would not be tolerated. While the animus behind the selection of racial or religious criteria for class membership, as opposed to assumption of the risk, differ, neither is sanctioned by Congress or the Sentencing Commission.

The Ninth Circuit had recognized the continuing validity of individualized sentencing under the Sentencing Guideline Act. Although it denied a due process challenge to the Guidelines, the court observed that the Guidelines "do not infringe a defendant's right to an individualized sentence..." U.S. v. Brady, 895 F.2d 538, 540 (9th Cir. 1990). "Our concern is less the appropriateness of a given sentence than the propriety of the

process through which it is imposed..." Id. at 541, quoting U.S. v. Barker, 771 F.2d 1362, 1365 (9th Cir, 1985). Title 18 U.S.C. § 3661 reflects this essential of due process, stating that "No limitation shall be placed on the information concerning the background, character, and conduct" which a court may receive and consider in imposing an appropriate sentence. The lower court's classification of the petitioner with other defendants aware of their medical condition at the time of their offenses contravenes these due process and equal protection principles.

The statute authorizing the Sentencing Commission and the Sentencing Guidelines, 28 U.S.C. § 991(b), specifically imposes a duty on the Commission and the courts to insure that a sentence take into account the provisions of 18 U.S.C. 3553(a)(2). Appendix, infra

at 42a. Section 3553(a)(2) requires that the sentencing court "shall consider" specified factors, including "The need for the sentence imposed...to provide the defendant with needed...medical care...in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). See Appendix, infra at 41a. The statute therefore requires a two-part determination: First, what are the defendant's medical needs, and second, how can the sentence provide for them in the most effective way.

The opinion below correctly noted that "...the district court's consideration of the adequacy of medical care that would be available to Petitioner in prison is mandatory..." Memorandum Opinion, Appendix infra, at 3a. The opinion did not address whether the court was required to exercise its discretion on the health departure issue, but assumed that exercise occurred. It therefore declined to review that

exercise, citing U.S. v. Morales, 898 F.2d 99, 101-103 (9th Cir. 1990), for the proposition that 18 U.S.C. § 3742(a) does not allow for appellate review of discretionary refusals to depart downwards. The Ninth Circuit, however, ignored its own caveat to that holding: "absent constitutional concerns." Id. at 103.

Whether the court exercised its discretion or not is critical because § 3553 requires the district court to exercise its discretion on the health departure issue. That statute not only requires the court to consider the defendant's need for medical care and the effectiveness of the care available, but also:

> "any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;"
>
> 18 U.S.C. § 3553(a)(5)

The provision providing for a health departure, U.S.S.G. § 5H1.4, is just such a policy statement, and provides that "...an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; ..." Appendix, infra at 43a. The placement of this policy statement in Chapter 5 of the Guidelines entitled, "Determining the Sentence," further indicates the Commission's intent that the court should be guided by that policy statement before imposing any sentence. This Court has held that "Policy Statements" of the Sentencing Commission are binding upon the courts, just as are the guidelines, at least where they direct a court not to take a specific action. Williams v. U.S., 503 U.S. ___, 117 L.Ed.2d 341, 353 (1992).

Although the district court muddied the distinction between a health study and a health departure, and the Ninth Circuit's

reasoning assumed that the sentencing court had exercised its discretion on the health departure, the district court unambiguously declared that the petitioner would not be considered for a health departure because of his status. That is, the court refused to exercise its discretion:

> "Notwithstanding that the appellant is HIV positive, the appellant knew he was HIV positive at the time he committed the instant very serious drug offense. Accordingly, the court would not base any health departure downward on the fact that this appellant is HIV positive."
>
> (emphasis added) Order Denying Bail Pending Appeal, Appendix infra at 33a.

This statement demonstrates that the court was not considering either the needed medical care of the defendant, the institution's ability to provide adequate care, or the applicability of U.S.S.G. § 5H1.4 to the petitioner's medical condition. In contrast, a Southern

District of Florida court followed its statutory duty in assessing the ability of a BOP facility to provide effective care to an inmate with AIDS. Botero Gomez v. U.S., 725 F.Supp.526 (S.D.Fla. 1989) [reversed on other grounds, 899 F.2d 1124 (11th Cir. 1990)].

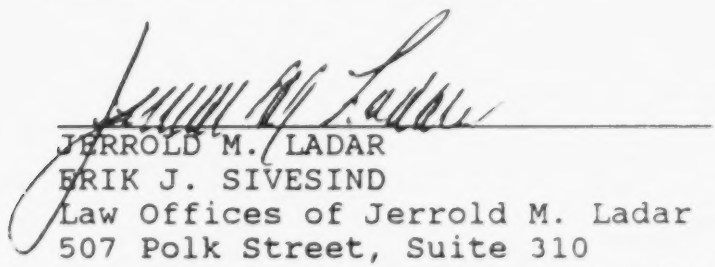
Because the defendant created his own health dilemma with awareness of the risk, the court refused to do that which it was statutorily required to do: make an evaluation of his individual medical needs under 18 U.S.C. § 3553(a)(2)(D), and to determine whether the policy statements of the U.S. Sentencing Commission, pursuant to § 3553(a)(5), applied to Petitioner. Those include whether Petitioner's medical condition constituted "an extraordinary physical impairment" under U. S. S. G. § 5H1.4. The district court failed to exercise its discretion to make that determination. The Ninth Circuit failed to

correct that error and in so doing has sanctioned an approach to sentencing medically infirm defendants that is contrary to statutory mandates and violates defendants' due process and equal protection rights under the Fifth Amendment to the Constitution.

CONCLUSION

For these reasons, the petition for certiorari should be granted. The sentence should be vacated and the case remanded to the trial court for resentencing.

Respectfully submitted,



JERROLD M. LADAR
ERIK J. SIVESIND
Law Offices of Jerrold M. Ladar
507 Polk Street, Suite 310
San Francisco, California 94102
(415) 928-2333
JERROLD M. LADAR
Counsel of Record and Counsel
for Petitioner GEORGE R. CROUCH

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GEORGE R. CROUCH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX

CONTENTS OF APPENDIX

Memorandum of Opinion Ninth Circuit . . 1a

Sentencing Hearing Transcript
(excerpts). 18a

Order Denying Bail Pending Appeal
(N. Dist. Calif.) (excerpts). 32a

Order Denying Rehearing (9th Cir.). . . 35a

Judgment in a Criminal Case 37a

Constitutional & Statutory Provisions 39a

F I L E D

NOV. 02, 1992

**Cathy A. Catterson,
Clk., U.S. Ct. of App.**

N O T F O R P U B L I C A T I O N

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 91-10567
	)	
v.	)	CR-90-00623 JPV
	)	
GEORGE RAYMOND CROUCH,	)	**MEMORANDUM** *
	)	
Defendant-Appellant.	)	
	)	
	)	

Appeal from the United States District Court for the Northern District of California
John P. Vukasin, Jr.,
District Judge, Presiding

Argued and Submitted September 15, 1992
San Francisco, California

Before: CHOY, ALARCON, and HALL, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

George R. Crouch appeals his sentence of 200 months imprisonment and five years of supervised release and his fine of $1 million on a conviction of possession with intent to distribute 24 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). Specifically, Crouch, who is HIV-positive, appeals the district court's denials of (1) his request for a discretionary study of the adequacy of medical care he would receive in prison, (2) his request for a downward departure from the sentencing guidelines based on his poor health, and (3) the government's motion for a downward departure based on substantial assistance. The district court had jurisdiction under 18 U.S.C. § 3231, and this court has jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. We affirm the sentence and fine.

I.

Title 18 § 3553(a) requires a court to

consider certain specified factors when imposing a sentence. Among these factors is "the need for the sentence imposed ...to provide the defendant with needed ...medical care ...in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). When determining a sentence, a court that desires more information than is otherwise available to the court pertinent to a § 3553(a) factor "may order a study of the defendant." 18 U.S.C. § 3552(b). Therefore, while the district court's consideration of the adequacy of medical care that would be available to Crouch in prison was mandatory, the district court had discretion whether to order a presentence study relevant to that factor. The district court did not abuse that discretion here.

Crouch correctly points out that a district court must make factual determinations underlying application of the Sentencing Guidelines by a preponderance of

the evidence. United States v. Wilson, 900 F.2d 1350, 1354 (9th Cir. 1990). Crouch argues that the court did not have sufficient information to make a determination with respect to a § 3553(a) factor, and thus abused its discretion by not ordering a study. In particular, Crouch argues that because his medical condition is "unique" among HIV-positive individuals,[1]\ the court improperly relied upon Bureau of Prisons ("BOP") information that only described the HIV/AIDS treatment generally available through the BOP and that did not address Crouch's medical situation specifically.

We review findings of fact underlying

1\ Crouch contends that his condition is unique because (1) even before becoming infected with HIV he suffered from an immune deficiency, and thus is at greater risk of developing infections than other HIV-positive persons, and (2) by following an atypical health regimen he has staved off the onset of AIDS for an unusually long period of time, about nine years.

a sentencing determination for clear error. United States v. Upshaw, 918 F.2d 789, 791 (9th Cir. 1990); United States v. Burns, 894 F.2d 334, 336 (9th Cir. 1990). Under this standard, we "'will not reject the district court's factual findings unless we are "left with the definite and firm conviction that a mistake has been made."'" Upshaw, 918 F.2d at 791, quoting United States v. Zavala-Serra, 853 F.2d 1512, 1515 (9th Cir. 1988), citing United States v. McConney, 728 F.2d 1195, 1202 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

In determining that the sentence imposed would provide Crouch with the medical care he needs, the district court's ruling was not clearly erroneous. The court had detailed evidence from Crouch concerning his medical condition and regimen with which the judge could compare the BOP's general information explaining the treatment available to all incarcerated HIV/AIDS

patients. Crouch has provided no legal justification -- and we see none -- for his argument that the district court should have relied only on information specific to Crouch, rather than the BOP's generalized information.

II.

Crouch also argues that in deciding to deny his motion for a study, the court relied upon an impermissible factor. He notes that the court explicitly accorded, in its words, "a great deal of weight" to the government's argument that Crouch knew he was HIV-positive before becoming involved in the offense, and thus assumed the risk to his health inherent in the possibility of being brought to justice. Crouch essentially contends that because the district court is not required to consider this assumption of risk argument as a factor in sentencing, it may not consider it as a reason to reject a request for a

discretionary study.

This contention is not supported by any legal justification. The only cases that Crouch cites are inapposite, because they concern courts' consideration of factors when deciding to depart upward from the sentencing guidelines. United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990) (court may base upward departure on factors not accounted for in sentencing guidelines but not on factors already implicitly accounted for; mixture of proper and improper reasons for upward departure demands reversal); United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989). The situation in each of those cases, where the lower court was required to properly justify its upward departure, is not analogous to the discretionary denial of a study request. The Sentencing Act does not limit the information a sentencing court may consider when deciding whether it needs more

information pertinent to a § 3553(a) factor.

III.

Crouch further contends that the district court failed to comply with sentencing guidelines policy statement § 6A1.3 because the court did not notify him of its tentative findings with respect to his motions for a study and health departure. Section 6A1.3(b) provides that "[t]he court shall resolve disputed sentencing factors in accordance with [Fed. R. Crim. P. 32(a)(1)], notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence."

In order to prevent surprise and provide a meaningful opportunity for comment, a court clearly must notify a defendant of factors that it considers grounds for upward departure. Nuno-Para, 877 F.2d at 1415; United States v. Ramirez

Acosta, 895 F.2d 597, 600-01 (9th Cir. 1990). But Crouch has put forth no legal justification for extending this requirement to discretionary refusals to order a study and to depart downward. Notice of a decision to stay within the guidelines would not serve any policy analogous to that underlying the notice requirement where a court intends to depart. Crouch in any case had actual notice during the month before the sentencing hearing that the court intended to deny the study request but would revisit the issue at the sentencing hearing. Moreover, Crouch did in fact present detailed health information to the court before sentencing, indicating that any lack of notice did not prejudice him.

We have considered and reject Crouch's additional arguments against the district court's denial of his study request.

IV.

Crouch also appeals the district

court's denial of his request for a downward departure from the sentencing guidelines for health reasons, as well as the district court's denial of the government's motion for a downward departure based upon substantial assistance. The district court's discretionary decision not to depart downward, and instead to impose a sentence within the applicable guidelines range, is not reviewable upon appeal. United States v. Morales, 898 F.2d 99, 101-03 (9th Cir. 1990). In Morales, this court dismissed an appeal of a district court's discretionary refusal to depart downward based on the defendant's age and physical condition. The court held that in framing the statute that governs defendants' rights to appeal federal sentences, 18 U.S.C. § 3742(a), Congress did not intend to allow for appellate review of discretionary refusals to depart downward from the guidelines. Id. at 101-02.

V.

Crouch argues in addition that the district court erred by failing to state its reasons for imposing a sentence at a particular point within the guidelines range, as 18 U.S.C. § 3553(c) requires where the span of the applicable sentencing range exceeds 24 months. Here, the applicable range was 188 to 235 months, thus § 3553(c) applies. Whether the district court failed to state its reasons for choosing a particular sentence within the sentencing range, as Crouch argues it did, is a question of law that we review de novo. Upshaw, 918 F.2d at 792.

Upshaw interprets § 3553(c)(1) to require a district court, when giving its reasons for fixing a particular sentence within an applicable range, to make a statement in open court that "expressly" considers the § 3553(a) sentencing factors. Id. at 793. Those factors include

"individual considerations of background, character and conduct, as well as the systemic goals of deterrence, rehabilitation, and consistency in sentencing." Id. at 792. The district court's statement of its reasons for sentencing Crouch to 200 months appears to be adequate under this court's interpretation of Upshaw in United States v. Johnson, 953 F.2d 1167 (9th Cir. 1992). In Johnson, the district judge noted in his written Memorandum of Sentencing Hearing and Report of Statement of Reasons that the defendant had "'committed four prior robberies, each one within a short time of release on previous robberies. All this was driven by a heroin addiction the def[endan]t has not been able to master. Protection of the public requires a sentence at the statutory maximum.'" Id. at 1173. The reviewing panel found that this statement complied with Upshaw's substantive

requirements. The district court's statement in sentencing Crouch, which referred specifically to his conduct, appears more similar to the court's statement in Johnson than the sentencing court's perfunctory statement found inadequate in Upshaw. Therefore, we find the district court's statement of reasons sufficient under § 3553(c)(1).

VI.

Finally, Crouch asserts that the district court erred in fining him $1 million without considering the factors specified in 18 U.S.C. § 3572 and U.S.S.G. § 5E1.2. Title 18 U.S.C. § 3572(a) lists seven factors that, in addition to the sentencing factors identified in § 3553(a), a court "shall consider" in determining a fine. The factors relevant to this case include "the defendant's income, earning capacity, and financial resources," and "the need to deprive the defendant of illegally

obtained gains from the offense." Title 18 U.S.C. § 3572(a). The sentencing guidelines provide that the court "shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). The guidelines also set forth a list of factors (that partly coincides with the § 3572(a) list) that the court shall consider in imposing a fine. U.S.S.G. § 5E1.2(d).

Crouch contends that the district court erred in imposing a $1 million fine without making specific fact findings on each of the factors listed in § 3572(a) and § 5E1.2(d), and suggests that the court lacked sufficient financial data to make an appropriate fine determination. The question whether the guidelines require specific findings on each of these factors, is a legal issue which we review de novo. United States v. Hill, 915 F.2d 502, 505

(9th Cir. 1990) (application of sentencing guidelines reviewed de novo); United States v. Kohl, 1992 W.L. 190287 (9th Cir. 1992).

Crouch cites three cases which, as he asserts, support the proposition that a district court must make specific fact findings on each of the factors in order to permit effective review. United States v. Chorman, 910 F.2d 102, 114-15 (4th Cir. 1990); United States v. Walker, 900 F.2d 1201, 1206-07 (8th Cir. 1990); United States v. Paskett, 950 F.2d 705, 709 (11th Cir. 1992). However, none of these cases is from the Ninth Circuit, and this circuit does not appear to apply such a stringent requirement. See United States v. Quan-Guerra, 929 F.2d 1425, 1427 (9th Cir. 1991) (citing Eighth Circuit in Walker, 900 F.2d at 1206, but looking to evidence in record as a whole in finding that district court adequately considered all required factors rather than requiring a specific

statement of findings on the factors).

Rather, this court in United States v. Rafferty, 911 F.2d 227 232 (9th Cir. 1990), held that the defendant bears the burden of establishing his inability to pay a particular fine. Crouch failed to present any evidence demonstrating his inability to pay the $1 million fine. Furthermore, the record indicates that the court had sufficient evidence before it to make a judgment in accord with § 3572(a) and § 5E1.2. Crouch's own sentencing memorandum stated that his assets include three homes, two apartment buildings, three undeveloped parcels and two vehicles -- in all of which he has an equity interest of about $2.8 million, and that the government seized from him $291,606 in cash and personal property worth $225,000. Thus, on the basis of the record, we conclude that the district court imposed a fine that adequately took into consideration the relevant required factors.

No express statement of findings on the factors was required.

AFFIRMED.

COPY

TRANSCRIPT UNDER SEAL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOHN P. VUKASIN, JR., JUDGE

UNITED STATES OF AMERICA, PLAINTIFF,	)	
VS.	)	NO. CR-90-0623 JPV
GEORGE R. CROUCH, DEFENDANT.	)	

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, NOVEMBER 6, 1991

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: WILLIAM T. MC GIVERN, JR.
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

BY: MARK ZANIDES
ASSISTANT UNITED STATES ATTORNEY

FOR DEFENDANT: JERROLD M. LADAR, ESQ.
507 POLK STREET, SUITE 310
SAN FRANCISCO, CALIFORNIA 94102-3384

REPORTED BY: LAWRENCE J. WHITE, CSR, CP, CM
OFFICIAL REPORTER, USDC

COMPUTER-AIDED TRANSCRIPTION BY TURBOCAT

WEDNESDAY, NOVEMBER 6, 1991 9:10 A.M.

THE COURT: CALL THE CASE.

THE CLERK: UNITED STATES OF AMERICA VERSUS CROUCH, CR-90-0623.

APPEARANCES, PLEASE.

MR. ZANIDES: MARK ZANIDES FOR THE UNITED STATES. GOOD MORNING.

MR. LADAR: JERROLD LADAR FOR MR. CROUCH. GOOD MORNING.

THE COURT: GOOD MORNING.

MR. LOPEZ, THE PROBATION OFFICER, IS HERE. THE MATTER IS ON FOR SENTENCING.

IS MR. CROUCH PRESENT?

MR. LADAR: YES, HE IS, YOUR HONOR.

THE COURT: ANY REASON WHY SENTENCE SHOULD NOT BE PRONOUNCED AT THIS TIME?

MR. ZANIDES: NO, YOUR HONOR.

MR. LADAR: YES, THERE IS A REASON, YOUR HONOR.

[Pages 3-19 not reproduced]

[Transcript at 20:7]

THE COURT: SECONDLY, I SHOULD TELL YOU, SO YOU KNOW WHAT TO SAY, I GIVE A GREAT DEAL OF WEIGHT TO THE STATEMENT SET FORTH IN MR. ZANIDES' MEMORANDUM THAT DEFENDANT CROUCH BECAME AWARE HE WAS HIV POSITIVE IN 1988.

I AM READING FROM YOUR MEMORANDUM: "THIS AWARENESS LONG-PREDATED THE ACTIVITY IN THE INSTANT AND VERY SERIOUS DRUG TRAFFICKING OFFENSE. INDEED, IT APPEARS THAT CROUCH WAS ACTIVELY INVOLVED IN OTHER DRUG TRAFFICKING ACTIVITIES EARLIER IN 1989 AS WELL. THEREFORE, IT IS CLEAR THAT THE RISK OF BEING CAUGHT WAS WELL-KNOWN TO CROUCH. IT IS A RISK WHICH HE WEIGHED AND DECIDED TO TAKE. THIS WAS NOT THE ACT OF A MAN DESPERATELY IN NEED OF MONEY, FOR HE OWNED THE PROPERTIES WHICH AGGREGATED OVER $3 MILLION IN VALUE

AT THE TIME OF HIS OFFENSE. RATHER, THIS ACT WAS THE ACT OF A MAN ACCUSTOMED TO THE RELATIVELY EASY MONEY PROVIDED BY DRUG TRAFFICKING. THIS WAS THE ACT OF A MAN WHOSE CAUTION IN DEALING WITH DRUGS HAD AFFORDED HIM GREAT FINANCIAL REWARDS. THIS IS A MAN WHO THOUGHT HE WAS IMMUNE FROM THE LAW, A MAN WHO EVEN IN HIS OWN ILLNESS DID NOT TAKE INTO ACCOUNT THE DAMAGES HE COULD VISIT ON OTHERS BY TRAFFICKING IN DRUGS.

TO THE EXTENT THAT HE MAY SUFFER ADDITIONAL STRESS AS A RESULT OF HIS INCARCERATION IS A RESULT WHICH HE BROUGHT UPON HIMSELF. IT PROVIDES NO REASON FOR THIS COURT TO DEPART DOWNWARD FOR HEALTH REASONS AND, SIMILARLY, NO REASON ON THIS RECORD FOR THE COURT TO ORDER A SECTION 3552 STUDY."

I AM INCLINED TO ACCEPT THE RECOMMENDATION OF THE FEDERAL GOVERNMENT, MR. LADAR.

MR. LADAR: I HAVE TWO COMMENTS, YOUR HONOR. THE FIRST IS IN RESPECT TO THE LETTER FROM DOCTOR MORITSUGA, WHICH IS NOT A DECLARATION. THERE IS A DECLARATION BY ANOTHER PERSON.

BUT DOCTOR MORITSUGA'S LETTER SIMPLY INDICATES THAT FDA APPROVED THERAPIES CAN BE ADMINISTERED BY THE BUREAU OF PRISONS, OR WILL BE ADMINISTERED BY THEM.

THAT DOES NOT ADDRESS ONE OF THE ISSUES THAT THE STUDY WOULD DETERMINE, AND THAT IS WHETHER OR NOT WHAT THEY ARE PRESENTLY USING, WHICH THEY DO NOT DETAIL IN THIS LETTER PARTICULARLY, WILL BE APPROPRIATE FOR THE TREATMENT OF THIS DEFENDANT AFTER THEY HAVE CONDUCTED A STUDY TO DETERMINE WHAT IT IS THEY THINK HE NEEDS.

ACCORDING TO THE AFFIDAVIT WE

SUBMITTED, THE REGIMEN OF TREATMENT THAT HE REQUIRES MAY OR MAY NOT BE ONE THAT THEY WOULD APPROVE. THIS LETTER SIMPLY SAYS WE HAVE A SYSTEM IN PLACE WHICH WE BELIEVE WILL PROVIDE ADEQUATE MEDICAL CARE FOR HIV POSITIVE INDIVIDUALS. THERE IS ABSOLUTELY NO INDIVIDUALIZATION IN HIS LETTER WHATSOEVER IN RESPECT TO MR. CROUCH.

HE MENTIONS THAT HE TYPICALLY STAFFS WITH VARIOUS PEOPLE, AGAIN WITHOUT CROSS-EXAMINATION OF THE CIRCUMSTANCES THAT ARE IN EXISTENCE. THIS LETTER SIMPLY DOES NOT PROVIDE ANY GUIDANCE AS TO WHETHER OR NOT THIS INDIVIDUAL NEEDS WHAT HE GETS NOW AND WHETHER THEY CAN PROVIDE ADEQUATE TREATMENT, EVEN IF THEY ASSUME HE DOESN'T NEED EVERYTHING THAT HE DOES NOW BECAUSE YOU CAN'T TELL FROM IT WHAT IS AVAILABLE.

APPROVAL OF REVIEW PROCESSES IS PROVIDED TO ACCOMMODATE PATIENTS WHO ARE UNRESPONSIVE TO CONVENTIONAL THERAPIES. WE HAVE NO IDEA WHAT THAT MEANS, NOR WITHOUT A

STUDY CAN YOUR HONOR KNOW WHAT THEY MEAN BY THAT OR HOW IT APPLIES TO MR. CROUCH.

THAT IS THE DIFFICULTY WITH THIS. I WOULDN'T EXPECT THE BUREAU OF PRISONS, PARTICULARLY WITH THE ATTACK THAT HAS BEEN MADE ON THEM BY "60 MINUTES" AND OTHER NEWSPAPERS REGARDING THE ADEQUACY OF HEALTH CARE ---

THE COURT: ONE SECOND. EXCUSE ME. I CANNOT LET THAT PASS WITHOUT A COMMENT. 60 MINUTES CARRIES ABSOLUTELY NO WEIGHT IN THIS COURTROOM. I KNOW OF FALSE PROGRAMS THEY HAVE PUT ON. SO DON'T EVER CITE 60 MINUTES TO ME.

MR. LADAR: I AM NOT SAYING THAT THE NEWSPAPERS OR ANY TELEVISION MEDIA ARE NECESSARILY CORRECT. WHAT I AM SAYING IS THAT ONE WOULD NOT EXPECT THE BUREAU OF PRISONS TO COME FORWARD AND SAY "WE CAN'T PROVIDE THE NECESSARY MEDICAL CARE," GIVEN WHAT THAT WOULD MEAN IN THE PROCESS OF HANDLING PRISONERS IN THE UNITED STATES.

WHAT THEY SAY HERE IS WE HAVE PROCEDURES IN PLACE. BUT THAT'S THE EQUIVALENT OF, FOR EXAMPLE, THE MARSHAL'S SERVICE ARRIVING AND SAYING "WE HAVE PROCEDURES IN PLACE TO BE SURE PRISONERS ARE ALWAYS IN COURT WHEN THE MATTERS ARE CALLED." WE KNOW, AS A PRACTICAL MATTER, IT DOESN'T WORK THAT WAY.

YOU HAVE TO MAKE INQUIRY INTO THE INDIVIDUAL SITUATION. THAT IS WHAT THE STUDY IS FOR. THAT IS THE REASON CONGRESS PUT IT IN THE STATUTE, AND THAT IS THE REASON THE SENTENCING COMMISSION SAID YOU NEED TO KNOW WHAT THE MEDICAL CARE IS AND APPLY THE FACTS TO IT.

THAT IS THE REASON A STUDY WOULD ASSIST IN THIS PARTICULAR CONDITION. BECAUSE THIS AFFIDAVIT, WITHOUT CROSS-EXAMINATION, THE COURT SHOULD NOT RELY ON AS DEFINITIVELY ESTABLISHING ANYTHING.

WHEN I SAY "THIS AFFIDAVIT," I AM

REFERRING TO E.S. NELSON, WHO IS A D.O., CHIEF OF MEDICINE FOR THE BUREAU OF PRISONS. HIS, TOO, DOES NOT PROVIDE ANY MORE DETAIL.

SO MY FEELING IS IF THE COURT WERE TO RELY ON THESE AFFIDAVITS WITHOUT PERMITTING CROSS-EXAMINATION, WE WOULD HAVE AN ERROR OF CONSTITUTIONAL DIMENSION, SIXTH AMENDMENT CONFRONTATION RIGHTS, BECAUSE THESE FACTS SIMPLY DON'T DEFINITIVELY SETTLE THE PROBLEM. A STUDY WOULD.

THERE IS REALLY NO PREJUDICE TO THE UNITED STATES OR TO THE COURT PROCESS FROM HAVING THE STUDY, BECAUSE IT CAN ONLY PROVIDE MORE INFORMATION UPON WHICH TO DETERMINE WHETHER OR NOT THE MEDICAL CARE IS ADEQUATE.

AS TO THE SECOND POINT THE COURT MADE WITH RESPECT TO MR. CROUCH, THERE'S NO QUESTION THAT HE HAD HIV BEFORE HE ENGAGED IN THE TRANSACTION IN THIS CASE, LET ALONE THE OTHERS THAT WERE INVOLVED.

by the defendant and the government, the Court finds that it is satisfied that the Bureau of Prisons will provide an appropriate standard of medical care. The Court further finds that it is unnecessary to conduct an evidentiary hearing on this issue. The Court further finds any appeal the defendant may take from this determination will not result in a finding by the Court of Appeals that this Court abused its discretion in not ordering a further study pursuant to 18 U.S.C. § 3552(b).

10. The Court further finds that notwithstanding that the defendant is HIV-positive, the defendant knew he was HIV-positive at the time he committed the instant very serious drug offense. Accordingly, the Court would not base any "health departure" downward on the fact that this defendant is HIV-positive.

For the foregoing reasons, it is

BUT THAT MEANS THAT IF WE WERE TO APPLY THAT CRITERIA AS TO WHETHER A STUDY SHOULD BE UNDERTAKEN, NO DEFENDANT WHO, AFTER ALL, HAD A PRIOR HISTORY OF ANYTHING WHO COMMITTED A CRIME WOULD BE ELIGIBLE FOR THE STUDY.

THERE IS NO INDICATION IN THE STATUTES, OR THE SENTENCING COMMISSION TABLES, OR THE COMMENTARY, OR SENTENCING GUIDELINES, OR THE LEGISLATIVE HISTORY, THAT INDICATES THAT ANY OF THAT BEARS ON WHETHER A STUDY UNDER 3552 TO DETERMINE IF THE MEDICAL CARE IS ADEQUATE AND IF IT CAN BE SUPPLIED TO THE DEFENDANT HAS ANYTHING TO DO WITH THEIR PRIOR HISTORY.

SO I THINK, FRANKLY, THAT IS AN IRRELEVANT CONSIDERATION FOR THE PURPOSES OF DETERMINING HOW MUCH INFORMATION YOUR HONOR GETS IN RESPECT TO A FINAL SENTENCE. I WOULD URGE THAT THE STUDY BE DONE.

THE COURT: MR. LADAR HAS DONE WHAT I CONSIDER TO BE AND WHAT I FIND TO BE ONE OF THE FINEST JOBS OF MAKING A PRESENTATION ON BEHALF OF A CLIENT THAT I HAVE EVER SEEN. HE COVERED EVERY BASE, HE DID EVERYTHING THAT I COULD CONCEIVE THAT HE COULD HAVE DONE; AND NOT ONLY WERE HIS WRITINGS AND WRITTEN MATERIALS TO THE COURT VERY EFFECTIVE, BUT HIS ORAL ARGUMENT HAS BEEN VERY EFFECTIVE. HE IS A FINE LAWYER.

3552 PROVIDES, HOWEVER, THAT IF THE COURT DESIRES MORE INFORMATION AS A BASIS FOR DETERMINING THE SENTENCE, IT MAY ORDER A STUDY. I READ A GREAT DEAL OF MATERIAL IN CONNECTION WITH THIS REQUEST FOR A STUDY, AND I THINK I DO NOT NEED ANY ADDITIONAL INFORMATION, AND I AM PREPARED TO IMPOSE SENTENCE AT THIS TIME. THEREFORE, THE REQUEST FOR THE SECTION 3552 STUDY IS DENIED.

AS TO SENTENCING AND CUSTODY, I AM

GOING [THE] ACCEPT THE GOVERNMENT'S -- I AM GOING TO ADOPT AS A BASIS FOR MY SENTENCE ALL THE MATERIAL SET FORTH IN THE PROBATION OFFICER'S REPORT, EXCEPT INSOFAR AS THE BENEFIT OF THE MOTIONS AND COMPUTATION OF THE GOVERNMENT.

I AM GOING TO ACCEPT THE GOVERNMENT'S COMPUTATION OF ADJUSTED BASE LEVEL OF 36, WHICH [OF] RESULTS IN A RANGE OF 188 TO 235 MONTHS IN CUSTODY.

THE DEFENDANT WAS INVOLVED IN A SALE OF A LARGE QUANTITY OF COCAINE AND HAS BEEN ENGAGING IN THESE ACTIVITIES OVER A LENGTHY PERIOD OF TIME.

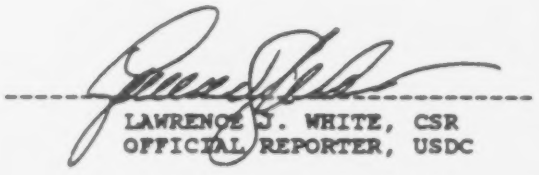
AT THE TIME OF HIS ARREST HE WAS ARMED. THERE WAS ADDITIONAL INDICATION DEFENDANT WOULD PROVIDE SUBSTANTIAL ASSISTANCE TO THE UNITED STATES IN THE PROSECUTION OF OTHER CASES, AND THE GOVERNMENT HAS ARGUED THIS.

THE PROBATION OFFICER TOLD ME WHAT HE HAS BEEN TOLD, AND I HEAR WHAT MR. LADAR

SAID. I AM GOING TO ACCEPT THE COUNT OF 36 IN IMPOSING A SENTENCE OF CUSTODY OF 200 MONTHS. IT'S TWELVE ABOVE AND 35 MONTHS BELOW THE GUIDELINE.

CERTIFICATE OF REPORTER

I, LAWRENCE J. WHITE, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT PAGES NUMBERED 2 THROUGH 33, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.



LAWRENCE J. WHITE, CSR
OFFICIAL REPORTER, USDC

ORIGINAL FILED

NOV. 14, 1991

Richard W. Wieking
Clk., U.S. Dist. Ct.
No. District of Calif.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CR No. 90-0623 JPV
Plaintiff,	)	
v.	)	ORDER DENYING BAIL PENDING APPEAL
GEORGE RAYMOND CROUCH,	)	
Defendant.	)	

Pursuant to the provisions of 18 U.S.C. § 3143(b), the Court hereby orders that the defendant George Raymond Crouch be detained pending appeal. The reasons for this Order are as follows:

(*9.) Having reviewed the submissions

---

* Paragraphs 1-8 and 11-13 not reproduced.

by the defendant and
Court finds that it i
Bureau of Prisons
appropriate standard o
Court further finds th
to conduct an evident
issue. The Court furt
the defendant may
determination will not
by the Court of Appe
abused its discretion
further study purs
§ 3552(b).

10. The Court
notwithstanding that
HIV-positive, the de
HIV-positive at the t
instant very seric
Accordingly, the Court
"health departure" down
this defendant is HIV-p

For the forego

of Prisons or
adequate profess
available in the
to perform the s
of the study shal
sixty days. Th
specify the addit
that the court
determining the
imposed. Such an
treated for a
purposes as a prov
of imprisonment
term authorized by
for the offense
study shall inq
matters that the
or the professio
believe are pe
factors set fo
3553(a). The peri
may, in the dis
court, be ext
additional period
sixty days. By t
the period of the
expiration of
granted by the c
States marshal
defendant is in
the defendant to
final sentencing
Prisons or the
consultants sha
court with a writt
pertinent results
make to the c
recommendations th
consultants be
helpful to a prop
the case. The repo
recommendations o
the consultants
guidelines and po

the government, the
satisfied that the
will provide an
medical care. The
t it is unnecessary
ary hearing on this
ner finds any appeal
take from this
result in a finding
ls that this Court
in not ordering a
ant to 18 U.S.C.

further finds that
the defendant is
endant knew he was
me he committed the
us drug offense.
would not base any
ward on the fact that
sitive.
ng reasons, it is

there are no
onal resources
local community
udy. The period
be no more than
e order shall
onal information
needs before
sentence to be
order shall be
dministrative
isional sentence
for the maximum
section 3581(b)
committed. The
uire into such
ureau of Prisons
nal consultants
tinent to the
th in section
od of the study
cretion of the
ended for an
of not more than
e expiration of
study, or by the
any extension
urt, the United
shall, if the
custody, return
the court for
The Bureau of
professional
l provide the
en report of the
of the study and
urt whatever
e Bureau or the
ieve will be
r resolution of
rt shall include
the Bureau or
concerning the
icy statements,

a

hereby ordered that the defendant be detained pending his appeal to the United States Court of Appeals for the Ninth Circuit, with the proviso that he may voluntarily surrender to the Bureau of Prisons Medical Facility in Springfield, Illinois.

IT IS SO ORDERED.

ORIGINAL SIGNED
J.P. VUKASIN, Jr.

JOHN P. VUKASIN, JR.
United States District Judge

ORIGINAL FILED

FEB. 24, 1993

Cathy A. Catterson
Clk., U.S. Ct. of App.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 91-10567
	)	
v.	)	CR-90-00623 JPV
	)	
GEORGE RAYMOND CROUCH,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

Before: CHOY, ALARCON, and HALL, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Hall and Alarcon have voted to reject the suggestion for rehearing en banc and Judge Choy has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no

active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

AO 245 S (Rev. 4/90 Sheet 1 - Judgment in ...inal Case

United States District Court

FILED
NOV - 7 1991
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN District of CALIFORNIA

UNITED STATES OF AMERICA
V.

GEORGE RATHOND CROUCH
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR-90-623 JPV

Jerrald Ladar
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) one.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1)	Possession of Cocaine with intent to Distribute		one

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) _____ which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 558-64-1707

Defendant's Date of Birth: 1/28/46

Defendant's Mailing Address:
24 Amberwood Lane
Walnut Creek, CA 94598

Defendant's Residence Address:
same

November 6, 1991
Date of Imposition of Sentence

Signature of Judicial Officer

J. P. Vukasin, Jr.: U.S. District Judge
Name & Title of Judicial Officer

NOV - 7 1991
Date

044

BEST AVAILABLE COPY

Defendant: George Raymond Crouch
Case Number: CR-90-623 JPV

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 200 months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.
  ☐ at _____ a.m./p.m. on _____.
  ☐ as notified by the United States marshal.
☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
  ☐ before [redacted] noon on 11/12/91
  ☐ as notified by the United States marshal.
  ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

_____
United States Marshal

By _____ 045
Deputy Marshal

BEST AVAILABLE COPY

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. § 3552

> (b) Presentence study and report by bureau of prisons. -If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau

of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements,

promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

Title 18 U.S.C. § 3553(a)

Imposition of a Sentence

(a) Factors to be considered in Imposing a Sentence. -The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(b) The purposes of the United States Sentencing Commission are to-

(1) establish sentencing policies and practices for the Federal criminal justice system that-

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

United States Sentencing Guidelines § 5H1.4

Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.
>
> [Amended, effective Nov. 1, 1991]